UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PETER ENEA, et al.,

Plaintiffs,

v. 12 CV 4656 (GBD)

BLOOMBERG, LP,

Defendant.

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November 20, 2012
10:45 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

GETMAN & SWEENEY, PLLC
Attorneys for Plaintiffs
BY: DANIEL GETMAN
ARTEMIO GUERRA

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
BY: THOMAS GOLDEN

JONES DAY
Attorneys for Defendant
BY: MATTHEW LAMPE

(Case called)

MR. GETMAN: Dan Getman and Artemio Guerra for plaintiffs, your Honor.

THE COURT: Good morning.

MR. GETMAN: Good morning.

MR. GOLDEN: Good morning, your Honor, Thomas Golden from Willkie Farr for defendants.

THE COURT: Good morning.

MR. LAMPE: Good morning, your Honor, Matt Lampe with Jones Day for defendants.

THE COURT: Good morning.

I have reviewed the motion for class certification, conditional collective action, approval. Let me hear from the plaintiffs first, and then I'll hear from you.

MR. GETMAN: Thank you, your Honor.

All the issues that were raised by the defendant to certification involved, essentially, the cohesiveness of the class; commonality, typicality, predominance, and that's with respect to the Rule 23 class.

And with respect to FLSA class, the only question is whether they're similarly situated. So, essentially, it's all the same issue.

And here, you know, the basic facts of this are, this is an extraordinarily cohesive class. We have one single location. All the plaintiffs worked in single pit, a single

call center in a single room for a single defendant in a single location. They had the same job title. They're G-tech reps. They sit and answer calls from Bloomberg customers. They trouble shoot problems with the Bloomberg terminal, which is the fundamental product of Bloomberg that they worked on. All the same title, all the same work rules. They all worked five eight hour shifts, and they had the same management policies. They had the same pay. They were all paid by salary. They did receive comp time when they worked weekends.

THE COURT: What do you mean by "same pay"?

MR. GETMAN: Not the exact same pay rate, but they were all paid by a salary at, you know, slightly variable amounts between --

THE COURT: That's true of you and me, so that doesn't make us similarly situated. I'm not sure what representation you're making with regard to payment of salary that is some commonality.

MR. GETMAN: Well, they all got paid a salary, but no time and a half for any of the hours over 40 that they worked. So they didn't get overtime. They did get a salary.

THE COURT: You're not claiming that there is any consistency with regard to the salary level. I'm not even sure whether you're claiming that they're paid an annual salary or they're paid an hourly wage.

MR. GETMAN: No, they're paid an annual salary.

THE COURT: Okay.

MR. GETMAN: There are other ways, obviously, that people can be paid. They can be paid hourly, they can be paid a day rate. They can be paid some combination of those rates. They can be paid overtime. They can be paid straight time for overtime rather than time and a half. They could be paid commissions. They could be all of those things.

THE COURT: Well, give me an example of what you say the -- you have three, four, or maybe four named plaintiffs?

MR. GETMAN: Yes.

THE COURT: What's the commonality with regard to their salaries?

MR. GETMAN: The commonality is that they got I think -- I believe it's between 50 and $70,000, but they were not paid any time and a half for any of the overtime hours that they worked.

THE COURT: Yeah, but that in itself is not the commonality. That's true of any claim that you would bring. That's the nature of the claim, that they didn't get overtime. That's not the commonality. The commonality is what is it about their jobs that is the same. To say that they -- say they all have the same claim for not being paid overtime is not the commonality. The commonality -- particularly with regard to salary, the commonality would be that they were paid the same wage for doing the same work, or they, you know, were -- I

mean, I'm not even sure what other commonality you would want me to look at.

MR. GETMAN: Your Honor is correct, that it's not the fact that they, that nobody got paid overtime that establishes the commonality.

But it is true that wage and hour cases are really simple in this respect, and particularly when everybody is treated the same. It is just that they got an annual salary divided up by week, and that they did not -- and that none of the class members got overtime for time and a half, and --

THE COURT: Yeah, but you just probably just described 90 percent of the people working, so that's --

MR. GETMAN: Which is --

THE COURT: I mean what -- for example -- and I understand that other elements around salary, but what is it that you claim -- it's unclear to me what, on what basis you claim each individual it was determined they would receive the individual salary that they received, with the commonality is about that.

MR. GETMAN: Judge, we haven't had discovery yet with respect to how Bloomberg set its pay rates or what variability there is in terms of starting pay or ending pay.

THE COURT: Well, that's their argument.

MR. GETMAN: Yeah, they've not --

THE COURT: Their argument is that's what you should

have before I certify the class.

MR. GETMAN: No, they did not raise pay as an issue in --

THE COURT: Not pay itself, but they said -- their initial position was always that, look, you don't have enough information to know when you got a class. That's why we should do some discovery. That's their argument.

MR. GETMAN: But, your Honor, there's nothing about any of the differences in pay that would defeat the commonality. There is no -- there is no situation here where some were paid a commission and some were paid a salary; that some were paid some overtime and others were not.

THE COURT: About --

MR. GETMAN: All these people received just one pay structure. They all worked --

THE COURT: What's the pay structure?

MR. GETMAN: The commonality here is with respect to the overtime hours that they did, all of them --

THE COURT: I'm sorry.

MR. GETMAN: The overtime hours that they worked, they were scheduled for --

THE COURT: But that's not -- we're not talking about salary. I was just concentrating on salary.

MR. GETMAN: Right.

THE COURT: That doesn't -- that's not a salary

element, whether they worked overtime. I'm trying to figure out -- you say the commonality is is they worked for a single -- they worked for a single company, single call center, they all had the same job title, and you say there was some commonality with regard to the annual salary. I don't understand -- I mean, what's the commonality between a person who makes $50,000 annual salary and the person who makes $70,000 annual salary?

MR. GETMAN: With respect to the claims at issue in the case, it doesn't matter -- several features matter for FLSA claims.

THE COURT: I understand that, but I'm just concentrating right now --

MR. GETMAN: On the salary.

THE COURT: -- on the salary, unless you want --

MR. GETMAN: I understand.

THE COURT: -- to withdraw that.

MR. GETMAN: No, I can identify three things. Maybe this will be a little clearer.

With respect to the claims and defenses, the only things that would matter are if any of the people made a salary of over $100,000, then they would be considered a highly compensated employee who would have resort to a different exemption.

THE COURT: Right, that's --

MR. GETMAN: Nobody -- that does not apply here. So everybody's salary is less than $100,000. So it's common at the level that it matters.

Number two is that it's a weekly salary paid the same amount to each person each time. Even those amounts -- even though those amounts themselves may vary, the variability is not about anything that matters with respect to either a claim or a defense. So any variation -- there are thousands of FLSA cases that are brought for hourly workers where the employer pays someone, I pay you 7.25 an hour as an employer, I pay you $10 an hour, I pay you $9 an hour based on your experience or your history. That hourly rate does not matter with respect to the Fair Labor Standards Act.

And the same is true here when the pay is calculated on a yearly basis or a weekly basis. So the differences in the pay just don't matter to either the claims or the defendants.

THE COURT: Right, but not what we're discussing. We're discussing -- you said there's commonality. One of the issues of commonality is their annual salary.

MR. GETMAN: Yes.

THE COURT: So I'm not asking you about what doesn't matter. I'm asking you about what why should I look at their salary and what about their salaries that makes me conclude that they're similarly situated. If I walk in the door and

somebody says I want to pay you $50,000 to do the job, and the next person walks in the door and says -- and they say I want to pay you $70,000 to do the job, what is the element of commonality or similarly situated with regard to annual salary that you're trying to emphasize?

MR. GETMAN: Maybe I got off on the wrong foot in terms of saying commonality about the salary. It's commonality about the pay. And the thing that's common about it is that all were paid a salary without time and one-half overtime. There could be variability in each of those -- in each of those elements. And in many of the cases cited by the defendant in fact that's what occurred. Some people in the class, in the proposed class did get overtime, some people were paid hourly, some people were paid salary, and the court said I can't certify this because I don't have a cohesive situation.

In our situation everybody was paid the same way. It's just simply that it was a salary, that the salary -- that there's no claim that the salary was over $100,000. There is no evidence that anybody in the class could resort to -- that the defendants could resort to the highly compensated employee exception to any of those plaintiffs.

And there is one other aspect, which is minor, but it does go to the same question your Honor is asking. And that is that they received comp time for weekend work and comp time, meaning that you receive the ability to take other hours off in

another pay week rather than receive actual overtime pay in the week in which you worked more than 40 hours. And comp time is a lawful policy for governmental employees, but it is not lawful in any respect with respect to private employers. So there is a -- that's a minor aspect of the claims here, but it is another element of the common practices with respect to the plaintiff.

THE COURT: Well, I'm more -- quite frankly, I'm trying to individually assess your class certification application. Technically, you have class certification applications. You want FLSA opt in class, then you say that Rule 23 you have independently a basis to conclude that there is a class under Rule 23.

With regard to my Rule 23 analysis, it seems to me that that's the one that requires a more specific factual showing at some stage of the proceeding, rather than the opt in claim. You're telling you 125 people who you claim should have gotten overtime and they didn't get overtime and you want to bring a FLSA claim, you want to conditionally say that, okay, these 125 people should be aware of this litigation, because they have to take an affirmative step to opt in timely in order to prosecute that case. That's a little bit more compelling at day one to say that, okay, for that purpose maybe it makes sense to notify these people that there is a claim, see whether you get ten, 25, 75 people who say they want to opt in, so then

we can get some sense of who really has an interest in participating in this litigation.

But it's a different analysis, although sometimes it turns out to be the same analysis, it's a different analysis, and it's a more, much more detailed analysis on the factors under Rule 23. For me at this stage of the proceeding to say that I know that you have a class of people that you have a representative plaintiff who is, you know, adequate to represent all of these plaintiffs of this class, and that at this point it's real important for you to establish that you do have that class rather than to have some more specific information that is being gathered in discovery before I prematurely certify that as a Rule 23 class, when I don't know anything about who these people are, what exactly is the nature of their hours worked, the differences in their claims, you know, the damages, how those damages have to be assessed. You know, there's some common defenses. I mean, they basically say all those people, just exempt employees. So in that sense there's some commonality right there in terms of what the real issue is with regard to all of these defendants.

But, you know, it seems to me that in many cases it's appropriate to go ahead at the time the FLSA opt in notice is sent out to tell them they also have an opt out notice. I always thought that was a little awkward to tell people sit around and do nothing and you'll get some money, but to get

some money you have to tell me you want to do something at the same time. But that works. It happens.

MR. GETMAN: Exactly.

THE COURT: And it works. But I mean you got 125 people at the most, so you got no more than -- I mean you'll be lucky if you have -- my experience would be it's unlikely you're going to get 100 people to opt in.

MR. GETMAN: Right.

THE COURT: And, you know, you probably are going to get a certain percentage of people to opt in. And then the real question then is those people who opt in, they preserve those claims and they could participate to what extent they want to participate in this litigation.

In terms of the Rule 23, you know, I am always hesitant simply on the lawyers walking in the door saying, Judge, we haven't done anything, we haven't come up with anything other than what we know our five plaintiffs have, and we want you to certify this as a class action on day one. It is the exception rather than the rule for me to do that.

MR. GETMAN: But, your Honor, if I may, you certainly can do it that way, was to certify FLSA class and then see what is drawn out of that and the commonality of the store is for those who opt in, to determine class action at a later time. So it's certainly possible to hold the class motion in abeyance until there has been discovery, and after people's FLSA rights

have been reserved in the sense of a notice going out and they opted in.

But -- and I only do wage and hour cases, so I see all sorts of variability. And in situations where that's appropriate, that is exactly what we do. Because I don't want to present a class motion that I'm not going to be able to succeed on, that I'm not going to be able to manage, that I'm going to have conflicts, and I'm creating and buying trouble for myself down the road. It doesn't do my clients any good, it doesn't do me any good, doesn't do anybody, and the court any good, none of it.

But I have never seen a more cohesive class involved than a situation where there simply is no variation that has been mentioned by the defendants in their papers that makes one little bit of difference with respect to either the claims or the defenses in this case. We could hold the class question abeyance till later, but there is no -- but the fundamental attributes of the job they did, of the way they were paid, and of how the hours worked, was the same for everybody.

Here everybody was scheduled for 40 hours, and then they had duties that they had to do outside the 40 hours. They had to take calls, continue with calls after their shift if they were still on the line. They had to continue with calls during lunch hours if they were still on a phone call. They had to come in early to boot up and log into the system to be

there before the start of the shift. They had to take certifications and exams and answer questions and do work, e-mails outside of the hours that they were scheduled for. So we know they got paid a salary. They got paid a salary for those 40 hours, and then they had all of the these kinds of work that everybody had to do as a G-tech rep.

The defendant claims everybody's exempt under the administrative exemption. The U.S. Department of Labor issued a very clear opinion letter in 2006 that said that people who that, IT people who sit in a call center and trouble shoot computer problems for customers are not administratively exempt and are not computer exempt. It is the Department of Labor's official position that determines the scope of this exemption, because Congress conferred on the Department of Labor the authority to define the scope of the exemption in the statute. So it's not just a question of them opining about the exemption. The Department of Labor actually creates the scope of the exemption in this case. So the opinion letter is not merely an advisory opinion, it is the law with respect to these people.

THE COURT: Well, but it's dependent on what, in fact, are the job responsibilities of the individual plaintiff.

MR. GETMAN: It's true, your Honor, if there was variability from that. They've not claimed anything is variable with respect to that, that -- the positions that were

expressed in that opinion letter, and this position, there are no material differences between them.

In this case these employees as a class -- let me also just also go back, because one other aspect of this is, when we first came in here, the defendant asked for discovery with respect to the class before, and your Honor said I don't see -- you have access to all of the papers, all of the electronically stored information, all the pay practices, you haven't showed me what the plaintiffs could possibly say that would bear on this question, but if you need some discovery from the plaintiffs, identify it in your papers and tell us what -- me what it is, and if it's premature to rule on class, then I won't do that.

The defendant in their papers did not identify a single issue that depends on discovery from the plaintiffs in this case. They have everything. They're the employer. It's a highly sophisticated employer that has all its e-mails, it has all its data, it has its pay practices. Nowhere did they say that there's some element that they needed that would come from the plaintiffs or other members of the plaintiff class that would make a difference here.

Based on what the defendants asserted in their papers, there is no reason to deny the class based on what the plaintiffs say and the defendants say. And there's a substantial overlap. They say they sit in the single call

center and -- I mean, we don't even have differences with respect to fact here that would play into this. There's no dispute.

I will point out that our people say, my primary job, and that of a G-tech rep is to sit in a call center and trouble shoot problems for Bloomberg customers. That's our primary job.

The defendant did not identify any other primary job, and certainly supplied no evidence that there was any other job that was considered primary.

And, lastly, just one final point on this. Bloomberg talks about having classified these people as exempt, but they supplied no evidence that they actually undertook any review, did a classification process, determined that G-tech reps qualified as some kind of exemption. They simply didn't pay overtime. That's what happened here. And there is no evidence in the record that they did any kind of classification of audits, no review by counsel, no review by an HR department, no nothing. They supplied nothing of the sort on this record. So if evidence about some classification and qualification for the exemption existed, they did not supply it on this motion and, therefore, I think, based on the evidence that is here before the Court today, there is more than enough to find that the hours practices demonstrate that everybody worked more than 40 hours, that no exemption applies based on the Department of

Labor opinion and the other opinions for -- court decisions for call center employees. And taking all of those together, there is no reason to not to certify a class on this particular record. It's always within the Court's power, should certification turn out later to have been inadvisable, to decertify once discovery is taken. And, in fact, if that would be something that I would not oppose in a situation where it was actually validly warranted. It creates manageability problems for me and -- if that were the case. We don't have that here. And if we later turn out to have those kind of manageability concerns where we have multiple people and multiple situations with different primary job responsibilities or different pay practices with respect to anybody, if these able counsel at two of the largest law firms in the world could not find a shred of evidence supporting the view that there is a different primary job than what is out there, I'm willing to bet that that evidence just simply doesn't exist, or it would've been here.

THE COURT: Thank you. Let me hear from the other side.

MR. GOLDEN: Thank you, your Honor.

It's not our burden to show that Rule 23 certification is inappropriate now. It's plaintiff's burden. And Mr. Getman is suggesting that we should do it backwards, which is, well, judge, I'm telling you that generally they all do the same kind

of work so let's go ahead and certify the class. If it turns out that the facts are otherwise, we can always fix it later. That's not their burden, that's not how Rule 23 works. The Court has to conduct a rigorous analysis of the entire record, and the plaintiffs have to proof by a preponderance of the evidence that each and every element of Rule 23 is satisfied. They haven't done that here. They chose to move for certification without discovery. We sought discovery, not because we wanted to determine facts regarding the plaintiffs' employment, but rather as I said at the time, we want to test the plaintiff's assertions regarding how they're in a position to speak for this supposed class of G-tech reps as to what G-tech reps did and how they went about their job.

It's clear that the plaintiff, the named plaintiffs are not in a position, or at least they don't say how they're in a position to say, I know that every other G-tech rep went about his or her job in the same way that I went about my job. All they say in that regard is the primary job for me and other G-tech representatives was to provide technical support for defendants customers who leased Bloomberg terminals and were having problems. They say nothing about how they went about discharging that role. They say nothing about how other people went about --

THE COURT: What difference does it make?

MR. GOLDEN: It makes a difference, your Honor,

because while --

THE COURT: You know what the facts are.

MR. GOLDEN: We know the --

THE COURT: I'm not sure I understand what you're saying. You -- this is the scenario you present to me. These -- you don't dispute any of the affirmative facts that they rely on.

MR. GOLDEN: Not true, your Honor.

THE COURT: Well, you don't -- let's -- you're not disputing that they all worked out of the single call center.

MR. GOLDEN: Correct.

THE COURT: You're not disputing that they all have the same job title.

MR. GOLDEN: Correct. And the regs make explicit, the CFR says job title alone is not relevant.

THE COURT: That's right. Well, that's why I'm moving past jobs.

MR. GOLDEN: And I understand.

THE COURT: And I didn't start with that.

MR. GOLDEN: Thank you, your Honor.

THE COURT: They all work at a single call center, they all have the same job title. They all have the same job description, right?

MR. GOLDEN: At a very high level, correct, and very high level --

THE COURT: So in that regard, all of that you agree that they're all similarly situated in that regard.

MR. GOLDEN: In that regard.

THE COURT: Okay. And they are all compensated with regard to the same formula.

MR. GOLDEN: They're all salaried and they're all entitled to incentive compensation. But --

THE COURT: Is there any anything different, other than an assessment of some people come in at the lowest salary, other people in at the highest salary, depending on negotiations and their background, is there really some -- in terms of where they worked, the job title, the job description and how they're paid, is there any variable there between one plaintiff, one potential plaintiff and another?

MR. GOLDEN: Yes, your Honor.

THE COURT: What's the variable?

MR. GOLDEN: And the variable -- I'm sorry -- go both to how they perform their job and how they're compensated, because one has -- one is related to the other.

THE COURT: Okay, wait a minute. Just a second. Let me write that down. Okay. You say the variables are in how they perform their job and how they're compensated.

MR. GOLDEN: Correct. And how --

THE COURT: Let's start with how they're compensated, because I didn't see anything in any of the papers that were

submitted to me that gave me a variable with regard to how they're compensated.

MR. GOLDEN: Well, what I mean by that is every year an employer's, is awarded a salary. He's awarded incentive comp, and the salary and the incentive comp they're awarded will reflect to a large degree, their own performance over the past year. Their own performance means not just how proficient they were at their job, but the extent to which they were proactive, to the extent to which they volunteered for special duties, the extent to which they had responsibility for major accounts as some G-tech reps do and others don't, the extent to which they were proactive in managing relationships between Bloomberg and its major account reps, the extent to which G-tech reps were involved in training others.

THE COURT: Well, and how does that reflect in how they're compensated?

MR. GOLDEN: It's part of the total mix of what am I, what salary am I going to award this individual as opposed to individual.

THE COURT: Well, give me an example. Because I don't get that from your papers. I understand what you're saying in the abstract, but I got a guy who is hired at $50,000 salary.

MR. GOLDEN: Right.

THE COURT: I've worked there for a year.

MR. GOLDEN: Right.

THE COURT: Tell me how do I get my salary, my next year's salary, and what's it based on, and how would I be compensated and how is it different than you compensate anybody else?

MR. GOLDEN: Okay, so how do I get more money? Get certified in specific technical areas, which all G-tech reps have the opportunity to get certified in specific areas that show they have particular expertise in a subject matter.

THE COURT: But there's nothing that automatically results from that.

MR. GOLDEN: It's part of the total mix of.

THE COURT: So when you assess whether they're going if get a raise, you determine how advanced -- how they've advanced as an employee and the significance of their handling of their accounts.

MR. GOLDEN: Among other things, that's correct.

THE COURT: That's true of everybody.

MR. GOLDEN: Understood. But these factors that Bloomberg will be considering, their technical proficiency, their involvement in training, extent to which they volunteer for special projects, the extent to which they are helping to manage an important relationship, those factors all, A, vary from G-tech rep to G-tech rep and, B, are going to go into the analysis as to why each individual G-tech rep is exempt, which is the ultimate question.

THE COURT: But that's not the analysis, relevant analysis it goes to. It goes to the relevant analysis of whether they're going to -- how much of a raise they're going to get.

MR. GOLDEN: For purposes of our discussion, agreed.

THE COURT: Right. So how is that somehow a determinative factor that these people aren't similarly situated? I mean, you know, when you take -- take your law firm or take some place else. Just because everybody says at year end, whether somebody is going to get a raise and somebody gets a $5,000 raise and the other person gets a $10,000 raise, that doesn't necessarily say that they're somehow, they're inconsistent as a class if they're raising the same issue about how they're compensated.

MR. GOLDEN: But respectfully, Judge, under Rule 23 where the issue is commonality and typicality, not merely we can identify a common question. Dukes made clear it's not enough to identify a common question. What you have to do is identify a common question that is going to drive the resolution of the litigation in one fell swoop.

THE COURT: But isn't that common question, as you've characterized it, whether they are in fact exempt employees or not exempt employees? Once I make that determination, all the other variables that you're talking about are irrelevant, aren't they. To the question of whether or not they have a

common cause of action, they say that they are, they say that they're entitled to overtime. Everyone says that they're entitled to overtime. You say none of them are entitled to overtime.

MR. GOLDEN: Correct.

THE COURT: So what is the variable that has anything to do with the issue that has to be resolved?

MR. GOLDEN: The variable, Judge, is how you get to that conclusion for each --

THE COURT: Right.

MR. GOLDEN: -- plaintiff.

THE COURT: Right. But what you just laid out, the annual raise is, itself, irrelevant to whether or not they're exempt or not exempt.

MR. GOLDEN: I'm sorry, your Honor, I don't disagree. I was just trying to be responsive to a question. Whether they get an annual raise is, my only point is it's determinative of a number of factors, and those same factors in many respects are the factors that will go into an analysis as to why --

THE COURT: But I don't understand -- you couched this issue very clearly for me in very, in very succinctly and accurately. You say the real sole issue here is whether they are in a job -- whether they perform a job which is an exempt classification.

MR. GOLDEN: Correct.

THE COURT: So that -- you don't say, well, I have 125 folks, 75 are exempt, 75 are not.

MR. GOLDEN: Correct.

THE COURT: The whole issue is that you say, you say what -- you say what they all have in common is that they -- none of them deserve overtime because they are all in the same exempt classification. Isn't that what you say?

MR. GOLDEN: That is what I say, your Honor. But in order to --

THE COURT: How is that not commonality?

MR. GOLDEN: Because it's not, it's not Dukes commonality because there is not a single question that your Honor can answer that will drive the resolution.

THE COURT: But there is.

MR. GOLDEN: But --

THE COURT: The single question is whether or not the exempt, the exempt classification that you say applies to everyone of these employees, whether that in fact applies to everyone of these employees. I don't understand an analysis that you're arguing that in order to determine whether they're exempt, that we're going to have to examine each individual person as to what they do because they all do something different. You're saying they're all exempt in the same way because of the similarities of their jobs; right?

MR. GOLDEN: Your Honor, but the FSLA --

THE COURT: Isn't that commonality?

MR. GOLDEN: It's not commonality, it's not sufficient commonality for Rule 23. And the reason for is that is the FLSA makes clear in order to determine whether an employee is exempt, the Court must engage in a highly specific granular analysis of that specific employee. What does he or she do every day. And --

THE COURT: Right. But you say everybody is exempt, is exempt.

MR. GOLDEN: I do, but --

THE COURT: You say everybody in this job title is exempt because they all are exempt in the same way.

MR. GOLDEN: They are all exempt.

THE COURT: In the same way, right?

MR. GOLDEN: No, your Honor. They're exempt --

THE COURT: Tell me, give me an example of how one is exempt using one standard and somebody else is exempt using a different standard.

MR. GOLDEN: It's not different standards, your Honor. It's different facts that the Court would consider. And I'll give as an example, real examples two declarants whose is declarations are before the Court.

So first let's start with Jenn Liguori, who put in a declaration. Now I think at the merit stage the Court would conclude that she's exempt.

THE COURT: Okay. Why?

MR. GOLDEN: First, she -- first, she exercises independent discretion and judgment in terms of resolving customer problems.

THE COURT: That's what you say about everybody, so that --

MR. GOLDEN: Agreed.

THE COURT: That's not an individual assessment that I have to make.

MR. GOLDEN: Second, she's a major account rep, so she, unlike some other G-tech reps, she has been identified as someone who is responsible for managing specific customer relationships, reaches out proactively with them, meets with them, talks about their needs, handles their problems specifically, so when those customers have an issue they go directly to her. She works with other groups within the company to identify software glitches when she's seen recurring problems, show works with other groups in the company in order to figure out --

THE COURT: Wait a minute, stop let me slow you down. Because the fact is is that you give me no evidence, you proffer no evidence that would indicate that you have made an individual assessment of each individual employee to determine whether that particular employee is exempt.

MR. GOLDEN: Correct.

THE COURT: You haven't made that argument.

MR. GOLDEN: I wouldn't make that representation.

THE COURT: Right. You're not making that argument. You're not saying that that's the relevant inquiry. You're saying the nature of their job, the nature of their job title is such that they are all exempt. And you -- the individual analysis that you're saying that the Court has to go through to figure out whether each individual person is exempt is not even your defense. You don't claim that that's why you say plaintiff A is exempt. You say plaintiff A through Z is exempt because they're all exempt in the same way because they're all doing the same job and they're all classified as exempt employees. And you have made no analysis, which you expect the Court to make, that somehow that you've gone through each individual job, each individual employee's job responsibilities and made an independent judgment that that particular employee is exempt. That's not the analysis that you argued in the way that they're exempt. You haven't -- you're right, you don't have -- you couldn't in good faith say that that's the issue because you've never -- you don't have that -- you've never done that analysis.

So isn't it kind of artificial to argue that it's the differences that predominate here, when there's no individual assessment that you've made of any individual employee, other than their job classification, to argue that they're exempt as

a class? Isn't that what you're really arguing, that they're exempt as a class of employees?

MR. GOLDEN: We argue that they're exempt.

THE COURT: As a class of employees.

MR. GOLDEN: Yes, but for different reasons.

THE COURT: Which puts them in a class.

MR. GOLDEN: But it doesn't relieve the Court, and the Rubbles case, which we cite, which is at 272 FRD 320, that's out of the Northern District, the Court addressed this exact point. Because the plaintiffs say, look, the defendant can't be now heard to argue that you need to do an individual by individual analysis, because they never did such analysis the Court said. It doesn't matter, they're two different questions. We're now in a litigation where the ultimate question will be, is each and every member of this class exempt, and --

THE COURT: You say every member is exempt regardless of -- your argument is every member is exempt regardless of any individual assessment of their individual responsibilities.

MR. GOLDEN: No. Your Honor, my argument to the contrary is, in the litigation context we'll have to do that individual assessment, but that individual assessment defeats the purposes of Rule 23. And if we put forward Jenn Liguori or Kristian Sawyers, who we already have as declarants who, by the way, describe different jobs --

THE COURT: But you say they're exempt in the same way.

MR. GOLDEN: They're exempt under the same exemption, but --

THE COURT: No, they're exempt under the same exemption, and you argue that they're exempt because of the same set of relevant facts, don't you?

MR. GOLDEN: No, your Honor. If I could continue, I talked about Jenn Liguori, who had responsibility for major, as major account rep.

THE COURT: Tell me, give me example of two people that you can argue that are not exempt in the same way.

MR. GOLDEN: Are exempt or --

THE COURT: Are not exempt in exactly the same way on exactly the same element that you have made that assessment and that you would put forth. Isn't it true that every single employee, every one of these 125 employees, it is your position, regardless of the additional arguments that you want to make, it is your legal position that they're exempt in the same way; right?

MR. GOLDEN: Not in the same way.

THE COURT: Well, who is not exempt in the same way?

MR. GOLDEN: Your Honor, if I --

THE COURT: Don't you argue that every one of these people exercises discretion in the job?

MR. GOLDEN: Yes.

THE COURT: That would make them all exempt, wouldn't it?

MR. GOLDEN: Correct.

THE COURT: So they're all exempt in the same way on that issue.

MR. GOLDEN: But they --

THE COURT: Solely on that issue you, if you prevailed on that issue, that would solely make them all exempt.

MR. GOLDEN: Agreed.

THE COURT: Okay.

MR. GOLDEN: But the reality, Judge, is we put forward ten employees, 20 employees. We say this is what they all do, here's why they're all exempt. I have no doubt that plaintiffs will say, well, you cherry picked them, those are not representative, we don't think they speak for the class.

THE COURT: But they're all exempt in the same way. You're using the same factor, using the same assessment. Whether you are saying they're exempt because they have a job in which they're supposed to use their discretion, they don't have different jobs.

MR. GOLDEN: They do have different jobs, your Honor. If I --

THE COURT: So give me an example of two people who have different jobs and job responsibilities.

MR. GOLDEN: Okay. We talked about Jenn Liguori, who is a major account rep, but talking about Kristian Sawyers, so number two, same position. He's --

THE COURT: Right.

MR. GOLDEN: G-tech rep.

THE COURT: Same job.

MR. GOLDEN: He's not a major account rep.

THE COURT: So, but he still has the same job. He could be a major account rep. That's because he doesn't have every a major account.

MR. GOLDEN: Exactly. But my point --

THE COURT: But that doesn't change the nature of the job. It's not as if one job title has a major account and another job title doesn't. All of these people equally have -- their job, their jobs titles themselves make them available to handle a major, a major account.

MR. GOLDEN: Make them eligible. It depends on --

THE COURT: Right.

MR. GOLDEN: -- Bloomberg's view as to whether they can handle that job.

THE COURT: So you think that the one person who is eligible who doesn't have it, and somebody who is eligible who does have it, the one who does have it is exempt, the one whose job makes them eligible is not exempt.

MR. GOLDEN: No, your Honor. To be --

THE COURT: That wouldn't be an argument, right, that's not --

MR. GOLDEN: They're all exempt.

THE COURT: They're all exempt because of the nature of their job responsibilities that are available to them. The fact is that they all -- within their job responsibilities and job titles, they're expected to handle major accounts.

MR. GOLDEN: That's --

THE COURT: Right?

MR. GOLDEN: No, your Honor, I'm sorry. That's incorrect. The major account representative is a designation that is bestowed upon a particular G-tech rep when Bloomberg concludes that this person has the right skill set in order to have that responsibility.

THE COURT: Everybody's eligible to do that.

MR. GOLDEN: But that's like saying everybody is eligible to be promoted to a different job. Everyone's eligible for it, but they have --

THE COURT: But you're not -- but I don't understand the nature of your argument is that you are -- you are going to defend against this lawsuit on the basis of, there are a handful of people who are major reps.

MR. GOLDEN: No. Your Honor --

THE COURT: Your main defense, the main defense that you put forward is that all of these people are in exempt

categories, that their jobs and their job responsibilities put them in exempt categories. That's your defense, right?

MR. GOLDEN: That's correct, your Honor.

THE COURT: Exempt categories across the board, that it applies to everyone.

MR. GOLDEN: Correct.

THE COURT: Not because they do different jobs, but you're saying it's because they do the same job. That's what makes them all exempt in the same way. Isn't that what your argument is?

MR. GOLDEN: My argument is the Court would reach the same ultimate conclusion for all of them. The factors that the Court would consider would vary from individual to individual, because they don't all do the same thing.

THE COURT: But I don't have -- you really haven't proffered any of that. You haven't -- the real question is not whether or not I would find them exempt if I went through each individual employee's circumstance. The question is, in order to resolve the dispute you have over whether these employees are exempt, whether I have to go through that individual analysis and I don't, because you say -- as a matter of fact, their job title, give me the job title again.

MR. GOLDEN: Global technical support representative. That's the job that applies, that's the title that applies to everyone in the putative class.

THE COURT: Wouldn't it be an accurate statement that you claim that simply because you are hired as a global technical support rep, that you are exempt; isn't that your argument?

MR. GOLDEN: Yes, Judge. Your Honor, I would say it slightly different.

THE COURT: How much more commonality can I have than that?

MR. GOLDEN: Because --

THE COURT: If you're in that category, you're exempt. If they say, wait a minute, I'm in that category and, no, we're not -- they don't argue that -- they don't argue the individual case as you don't argue the individual case. They say -- you say that because your job title is global technical support rep, you are exempt. They say, no. Because you're a global technical support rep, you're not exempt. Isn't that the determinative issue for everybody? If you're right, then all of their cases go away.

MR. GOLDEN: Correct.

THE COURT: If they're right, then they all get to recover similarly.

MR. GOLDEN: Correct.

THE COURT: Right? So what else in terms of commonality practically do I need at this stage?

MR. GOLDEN: Because the way to determine who is right

is to look at what each individual plaintiff class member is doing on a day-to-day basis.

THE COURT: That's not true. The way to determine what's right is to determine what does a global technical support rep do, and if that job is an exempt job, you're right. Then as you say, because they're a global technical support rep, they're exempt. If that job is not exempt, then they're right. Why do I need -- where is the individual analysis that I need? All I need to know is whether the range of responsibilities of a global technical support rep, and why you say just because I'm hired at that title, I will never get overtime. That's what you're saying.

MR. GOLDEN: Correct.

THE COURT: That's the dispute. The dispute isn't, well, we were told that somebody people would get overtime and some people wouldn't, but then we found out that they made an individual assessment of everybody, and nobody got it because they determined that nobody individually was entitled to it.

That's not the dispute here. The dispute here is that you say, look, from day one when we hire you as a global technical support rep, you will never get overtime, because I don't care what the nature of your responsibilities are. I don't care whether you have, you know, a major account or don't have a major account, you are exempt and will never get overtime. How is that -- where is the individual analysis that

I need to resolve?

MR. GOLDEN: Again, your Honor, at the risk of repeating myself, the case law, the FLSA, the Department of Labor made clear in order to determine that question, are you exempt or are you not, you have to look at what the individual does on a day-to-day basis. If your Honor juxtaposes the declarations of Jen Liguori and Kristian Sawyers --

THE COURT: Right.

MR. GOLDEN: -- your Honor would read -- would see that there are commonalities, but they do their jobs very differently.

THE COURT: But those commonalities are what you claim make them exempt, isn't it?

MR. GOLDEN: No, your Honor. It's --

THE COURT: How do you say no? You don't claim that one person is exempt and another person isn't.

MR. GOLDEN: Correct.

THE COURT: You claim that -- don't you claim that regardless of where I think you're going to be six months from now, regardless of how little or how much you do, how minor or how major your account is, on day one you're exempt and you will never get overtime; isn't that your position?

MR. GOLDEN: That is our position, your Honor.

THE COURT: So what difference does it make how well you advance six months later if whether or not I'm the worst

employee, the best employee, I'm the most sophisticated employee, I'm the least sophisticated employee, I have a major account or I have no major account, what difference does it make for any of these plaintiffs -- what individual assessment are you arguing needs to be made, since you categorically are blanketly saying, when I hire you day one, you're never going to get overtime.

MR. GOLDEN: Because, your Honor, the facts that I will point to, the job duties on which I will rely, will look different for each plaintiff.

THE COURT: How?

MR. GOLDEN: The fact --

THE COURT: Give me an example of somebody who could possibly have an appropriate exceptional job responsibility that you say would qualify them for overtime if they have the title of globe technical support rep. Give me an example -- I shouldn't say that, because the reality is that's a rhetorical question. The answer to that question is there is no circumstance. The person, the person could be hired on day one and be out on maternity leave for the next six months, and they still will never get overtime even though they may not have worked a single day at the job; right?

MR. GOLDEN: That's right, if they --

THE COURT: Because you say I hired you in an exempt category.

MR. GOLDEN: Correct.

THE COURT: An exempt job. The job that you're fighting about, it's jot not their responsibilities you're responding. Because you're saying to me, regardless of what your responsibilities are, you're not getting overtime because you're in an exempt job title; isn't that what you're saying?

MR. GOLDEN: Correct, correct.

THE COURT: Then what difference does it make?

MR. GOLDEN: Because now I have to prove it Judge. I now have to prove --

THE COURT: Right.

MR. GOLDEN: I have the burden of proof, and my proof for employee A will look different from my proof --

THE COURT: No it won't.

MR. GOLDEN: It will, Judge.

THE COURT: How could it be different, unless you can tell me that -- give me an example of a circumstance where someone in this title could be conceded by your company, conceded by the employer to be entitled to overtime? Is that even possible? The answer to that is no, right? It is not possible. No matter what individual inquiry that I make, there is nothing that I could find from your perspective that would make anybody who gets hired in this job eligible for overtime. Isn't that true?

MR. GOLDEN: If they perform the job the way the

Bloomberg expects them to.

THE COURT: Suppose they don't perform the job the way Bloomberg expects them to.

MR. GOLDEN: So --

THE COURT: Unless they get fired, they're still not going to get overtime.

MR. GOLDEN: They wouldn't get overtime, but that doesn't mean they would be considered exempt or nonexempt. If we have this hypothetical --

THE COURT: Yes, it does. You say they're exempt.

MR. GOLDEN: But the question, Judge, is not what is Bloomberg's classification. The question is is the classification correct. And so --

THE COURT: No. The question that we're discussing now is whether or not the classification applies to every single employee.

MR. GOLDEN: If it correctly applies.

THE COURT: If it applies to every -- well, it -- no, that's not true. It doesn't matter whether correctly or incorrectly, right? Not the class certification. It might be matter ultimately whether you win or lose. But the question is whether or not it is the same or different.

Now, I don't care whether it's right or wrong at this point in time. If it's wrong, it's still a class. If it's right it's still a class. The class falls together or they

rise together. It doesn't make a difference whether they're right or wrong.

MR. GOLDEN: But again, your Honor, going back to Dukes, the Supreme Court made clear it's not enough now under Rule 23 to simply say we can identify a common question that applies to the entire class. Because as the Court said, any class action counsel can identify a common question.

THE COURT: Right.

MR. GOLDEN: The issue is whether the common question will drive the resolution of the litigation to the exclusion of an individualized inquiry.

THE COURT: But it will. Because your position is that the only thing -- your position is not that you will have in this case any basis to allege as a defense that the reason these people are not getting overtime is because you made an individual determination that the nature of their responsibilities after they were hired in this position developed such that that is what prevents them from getting overtime. Your position is nobody gets overtime.

MR. GOLDEN: Correct.

THE COURT: Nobody.

MR. GOLDEN: Correct.

THE COURT: The whole universe, the whole class of people who are hired to do this job, regardless of the variations in their responsibilities and their job duties,

you're saying once you get hired in that position, you are in a class of employee that will never get overtime.

MR. GOLDEN: Correct.

THE COURT: Regardless of what your job responsibilities are, right? So what is the individual analysis that you say is being avoided?

MR. GOLDEN: Well, respectfully I think, your Honor is mixing whether the employer engaged in an individual analysis in making the determination of exempt versus nonexempt -- which I'm not suggesting that my client did -- versus a separate issue, which is in a wage and hour litigation, ultimately the question that the Court's going to have to consider is was the exemption classification correct. And, respectfully, the Court's going to have to do that on an employee-by-employee basis. And as a practical --

THE COURT: Why? You say they all have -- you say none of them -- you say the nature of their computer work, in and of itself, makes them not eligible for overtime. You say that that's true of everybody.

MR. GOLDEN: Correct.

THE COURT: If you are wrong on that, then your argument is going to be, well, if we're wrong on that, our secondary defense is going to be, well, look at John Smith, we gave him a little extra responsibility, so John Smith shouldn't get overtime.

MR. GOLDEN: No, your Honor, that's not a secondary defense. That's going to be our defense. We're going to say, look, these employees are exempt and here's the reason why.

THE COURT: You're saying each of these employees are exempt in a different way for me to say that it's not a class-wide decision.

MR. GOLDEN: We'll say they are exempt in many respects for slightly different reasons. And the challenge impose --

THE COURT: No. For the most part your primary argument will be and is, as you've put forth, that they're all exempt in the same way. That's your primary argument, isn't it?

MR. GOLDEN: Your Honor, it's not that they're all exempt in the same way.

THE COURT: But they are. They're exempt because they were hired as globe technical support reps.

MR. GOLDEN: But the issue again now is not -- the factual dispute --

THE COURT: Are you backing away from that argument that they all have that common defense that you wish -- you say is your primary defense, and if you prove that that is determinative of this case?

MR. GOLDEN: Certainly not, your Honor. But the question is there is not a factual dispute as to did my client

go through a person-by-person analysis. That's not a factual dispute. The factual dispute or the ultimate legal issue here is does the appellation of exempt actually apply to every single person in the class. And if I put forward an employee as here's an employee, that is what she does as a G-tech rep and this is why she's exempt, plaintiff's counsel will say well, she is not representative. She had extra responsibilities. I say, okay, let's go to employee number two. Here's why he's exempt. Certainly there will be overlap in terms of responsibilities on which I will rely, but there will be additional responsibilities as well. They say, well, you're still, you're cherry picking. Okay, let's go to number three. We will go down the line and look at what each and every employee does in order to adjudicate the ultimate question as to was this employee properly classified.

THE COURT: Give me the different individual job responsibilities --

MR. GOLDEN: Okay.

THE COURT: -- that you say that you're going to argue that that job responsibility, if you can find that in a particular employee, is going to make that employee exempt, independent of the blanket exemption that you're really arguing.

MR. GOLDEN: And, your Honor, to be clear, it is not that any one of these points will be dispositive. My point is

is that for each one, there will be a different mix, so here are the --

THE COURT: But, you know, you can't -- you can't win on that argument. Because the question -- there are two extremes; that each will be determinative; on the other extreme, each is irrelevant. In between is the mix.

MR. GOLDEN: Correct.

THE COURT: What you got to demonstrate to me that the balance is such that this individual -- give me some indication to conclude that this individual assessment is going to predominate over the commonality of all of these people being hired and being told on day one, that I don't care what you do. I don't care if you sharpen pencils downstairs or you come up with a cure for cancer, you're not going to get overtime, because none of your people are going to get overtime.

MR. GOLDEN: So here's the difference, your Honor, if I could -- here are specific points of distinction.

THE COURT: All right.

MR. GOLDEN: Some G-tech reps are major account reps, not all are. This is not something that just sort of depends on whether your account is major or minor. This is --

THE COURT: Okay, stop there.

MR. GOLDEN: Yeah.

THE COURT: What is it about being a major account rep that qualifies it as an exemption?

MR. GOLDEN: Because the plaintiffs argue -- by the way without any support in the record -- that all G-tech reps do is they sit in the same room and they automatically receive tickets for client problems and they sort of respond to them on a random basis.

THE COURT: Right.

MR. GOLDEN: That does not hold true for major account reps who have an independent relationship with their account. And we're talking about --

THE COURT: Yeah, but what is the legal -- being a major account rep -- I understand you're extrapolating to being a major account rep qualifies you as an exempt employee, because you're exercising significant discretion; is that your argument? What's the legal argument that goes behind --

MR. GOLDEN: Your Honor --

THE COURT: I don't know what a major account rep does. He could sweep the floor for a major account. I don't know what --

MR. GOLDEN: It's in the record. Both Matthew Mignone, who is the manager of this entire group, Jenn Liguori who is a major account rep, they put in declarations. They described what a major --

THE COURT: I know, but what is it about a major account rep that you say inherently makes that exempt just because you're a major account rep?

MR. GOLDEN: Not -- again, to be clear, not just because, but it certainly heightens and makes even more prominent the argument that I think applies.

THE COURT: The common argument.

MR. GOLDEN: The common argument that --

THE COURT: The common argument.

MR. GOLDEN: It enhances the common argument.

THE COURT: But that gives me commonality. That doesn't give me -- you can't -- if you want to give me something that isn't commonality, you have to give me some independent individual basis to conclude that one person is exempt and another person is not. Otherwise, I don't have a problem with deciding this. If you say, well, it adds to all of the common factors, what's the common factors that predominate here?

MR. GOLDEN: Your Honor, if my -- if your Honor perceives my burden --

THE COURT: I don't perceive your burden at all. It's my burden. I'm trying to articulate for myself, but I have no basis to articulate.

MR. GOLDEN: Your Honor, if the question to me is can I point to a factor that will differentiate some G-tech reps as exempt and some as not exempt --

THE COURT: Right, given --

MR. GOLDEN: -- I cannot, your Honor.

THE COURT: Right. But see, I'm not saying that's your burden. But I'm saying you want me to make the decision on this issue in face of their showing that simply because you're hired as a global technical support rep, you will never get overtime. And their position is that violates the law. Because being a global tech sport rep, in and of itself, does not deny you overtime.

Now, your response is, well, you know, they don't really know exactly what each individual person does. Well, I don't either. But I know that each individual person, regardless of what they do, is never going to get overtime, and that seems to be the question, here. So if you can justify, if you can justify why nobody gets overtime, that's what the issue is. The issue is, it's not going to take, as I say rocket scientist for me to figure out that the main dispute here is if you're hired in this category, just like everybody else, regardless of the job responsibilities you have, you will never be eligible for overtime, that's the presumption I see here. You don't dispute that.

MR. GOLDEN: Correct.

THE COURT: You simply say, well, yeah, that's true, but, you know, a lot of these people, they have some other duties that would make them exempt anyway.

Well, I mean, that's a defense. That's not their burden, you know. Their burden is to show me the commonality

and show me that that's what they're going to show. And they basically said, we're going to show you, Judge, that every one of these people are hired in a position where it has been -- the nature of the their job description, the job title that they're in, nature of that job description is such that all of these people should not be exempt employees. The other side won't pay them because they say they're all exempt employees regardless of what they do. That's what you say. That's your argument, that's your main argument.

MR. GOLDEN: Not regardless of what they do, Judge, because of what they do. I mean, it's not a -- it's not a blind designation. It's because of what they do. And these points of differentiation, they're not additional exemptions or additional reasons why they are exempt. They all go into the fundamental question of the total mix of responsibilities. And, your Honor --

THE COURT: But there is no mix. Every single, every single individual that you look at, regardless of all of the other factors that you argue for that particular individual, every single individual you will say, regardless of whether those factors exist or those factors don't exist, those employees are exempt; right?

MR. GOLDEN: We will say that for each employee.

THE COURT: Right. That's fairly common. That's your common theme, commonality --

MR. GOLDEN: But again, your Honor, if your Honor were to go back to the Second Circuit's decision in Meyers V. Hearse, 624 F.3d, 530, Second Circuit instructed that the assessment of whether an employee is exempt or nonexempt, necessitates an evaluation of the duties that the employee actually performs.

THE COURT: Right.

MR. GOLDEN: And the Second Circuit affirmed a decision denying a motion to certify a class where the district court held, we are going to have to go through an employee-by-employee analysis to determine what every employee actually does.

And, your Honor, the plaintiffs don't cite to a case post Dukes in which a Rule 23 class was certified on a wage and hour issue where the central dispute was are the employees exempt or not. They cite cases where classes were certified in the context of approving a settlement, and they cite to cases in which a class was certified where the issue was not whether an exemption applies. The fact --

THE COURT: But your argument, you know, I don't see -- you probably did make the argument, but I don't see -- I didn't really focus or notice any argument that you are really making that your defense would be that you're going to go employee by employee and demonstrate that the nature of that unique employee's responsibilities would independently make

that employee exempt. That's not your argument.

MR. GOLDEN: That is how we will -- we intend to address this case, your Honor. Because, again, I can come up with a job description of a G-tech rep.

THE COURT: Tell me what is it about -- pick one of the named plaintiffs, tell me what is it about the named plaintiff that makes them exempt.

MR. GOLDEN: Each of the named plaintiffs exercised independent discretion and judgment with respect to resolving customer inquiries.

THE COURT: In the same way as all other employees.

MR. GOLDEN: Incorrect, your Honor.

THE COURT: How is that incorrect?

MR. GOLDEN: Because not all the named plaintiffs were major account reps and so --

THE COURT: Wait a minute. No, no no. You want to say -- make major account rep is irrelevant. That's why I went to what are you saying is behind your major account argument. There is no legal argument if you are a major account rep you're exempt.

The question is whether or not they exercised discretion. Isn't that the real legal basis on which you could argue they're exempt?

MR. GOLDEN: That is the ultimate question.

THE COURT: And you argue that every single person who

gets this job exercises discretion, regardless of whether they're a major rep or not a major rep. So, therefore, none of them -- therefore, all of them are exempt. So it's irrelevant whether they're a major rep or minor rep, because you say they all exercise discretion. You say that's the nature of the job.

MR. GOLDEN: That's correct, your Honor. But plaintiff --

THE COURT: So then if I can resolve that, isn't that determinative of the issue?

MR. GOLDEN: No, your Honor. Well, let's take a named plaintiff, a named plaintiff, whom I believe was correctly classified as exempt. Your Honor may disagree, and your Honor may say --

THE COURT: I don't say I disagree. I don't know whether they are exempt or not exempt.

MR. GOLDEN: Understood, your Honor. I'm only saying -- my point is when we get to the merits determination, we'll have an argument as to whether the named reps were exempt or nonexempt.

Now, obviously I don't know how your Honor will come out on that issue, but your Honor's determination of that issue -- your Honor could say, Mr. Golden, I disagree with you, I think Mr. Enea is not exempt. I think otherwise, but it's not my call, it's your Honor's call. But your Honor's determination regarding Mr. Enea will not necessarily apply to

your Honor's determination regarding Ms. Liguor, because your Honor may say, as best I can tell, really all Mr. Enea did was he sat there, he received random tickets, he didn't really have any independent relationship with a customer. I think under the total mix, I don't think Mr. Enea is except. But with respect to Ms --

THE COURT: Why would I say that? You're not making that argument. You're not even going to make that argument. You're going to make the argument that every single person is exempt, whether or not they exercised any discretion because the nature of their job is that their job duties and responsibilities require that, when necessary, they exercise that discretion, right; isn't that the argument?

MR. GOLDEN: That is. But the point --

THE COURT: So why would I go -- what do I care whether or not they did exercise it or didn't exercise it? If you can demonstrate that the job -- that that was part of their authority and duties and that -- and as you argue, you don't argue that some people's responsibility and duties and not others. As a matter of fact, your argument, your argument would not prevail if your argument was, it's not a requirement that everybody exercise their discretion, but some do and some don't. That's not a legal argument; right?

MR. GOLDEN: That's not my argument.

THE COURT: Right. And that's not your argument. So

your argument has got to be, that's what's inherent to the job title, isn't it? The individual inquiry that you're saying you want me to make is not an individual inquiry whether or not Joe Smith exercised discretion on Tuesday and Susan Jones didn't exercise any discretion on Wednesday.

The question is are they in a job where that's their job responsibility. And your defense is, every single person is in that job and that job responsibility is to exercise that discretion. So it is irrelevant to my analysis who did it and who didn't do it; who had a major account and who didn't have a major account. Because your argument is, I assume -- and unless you want to abandon that today -- your argument is even for those people who don't have major accounts, even for those people who they -- that you cannot demonstrate that they exercised any discretion, the nature of the job requires it when it is necessary, so that is why they don't get overtime. And my analysis is not going to be driven by your arguing that, Judge, well, give the people overtime who never exercised any discretion and deny the people overtime who we can demonstrate did exercise some discretion, because those -- the ones who exercised it are exempt, and the ones who didn't exercise it are not exempt. You're saying all of them were in the same job with the same job title, and all of them were required to do so when necessary, right?

MR. GOLDEN: Correct. But the evidence -- I'm sorry,

your Honor. I think, your Honor, the position in which defendants will find themselves then is that your Honor will be only looking at, or the Court will only be looking at the, sort of the most common denominator, the employees who were at all I'll call it the base line.

THE COURT: No.

MR. GOLDEN: And ignoring the fact that there will be even stronger arguments regarding other G-tech reps. In other words --

THE COURT: Wait a minute. But how is it a stronger argument that you have evidence that a certain individual exercised a great deal of discretion, when your argument is that it's irrelevant whether they exercised that discretion. The legal question is whether that discretion is part of the job responsibility; right?

MR. GOLDEN: Correct.

THE COURT: So I assume you would agree and your argument will be -- as I say, regardless of the fact that Mr. Jones had a major account and exercised a lot of discretion on a daily basis, Ms. Smith, the nature -- they had the same job. So the nature of her job is also exempt regardless of whether she exercised more, less, none or some discretion. Because that's what is required of her to be able, willing and available to do that if she is a global technical support rep. So by definition a global tech -- your argument is by

definition, a global technical support rep exercises discretion, has to be ready to exercise discretion.

MR. GOLDEN: Correct.

THE COURT: That is the determinative issue. If you're wrong on that, you lose. If you're right on that, you win.

If you're right on the fact that it's not necessary to do that, but we have some people who do do that and some people who don't, you still don't win as to those people who do that, because that's not the nature of the job responsibility. That's not required by the job. It's what's required by the job. If you say they have a different job, you can't say they do a different thing. You have to say they have a different job. They have a different job, set of job responsibilities.

Your argument is that the only basis for denying overtime is that everybody has a job whose job responsibilities are that they must be able and willing to exercise significant discretion.

Those people -- I mean, you know, if we're working at McDonald's and the manager exercises discretion and then the guy who is making french fries is sitting there trying to decide whether he's going to put salt or pepper on the french fries, that doesn't make him exempt just because he exercised some discretion. The question is whether the job requires him to exercise that discretion, whether the job duties,

responsibilities and titles come with it that kind of responsibility that would give them the exemption. The exemption doesn't go individual by individual. It goes job by job. And you're saying all these people have the same job.

MR. GOLDEN: Your Honor, I disagree that it goes job by job. I think that's the same as saying it goes by job title by job title, which the law clearly says no. The question is, based on what this person does --

THE COURT: No.

MR. GOLDEN: -- each and every day.

THE COURT: No. Based on what this person is required to do.

MR. GOLDEN: Respectfully, your Honor, and maybe this is the crux of the disagreement, I think it's what does the person actually do. And my point --

THE COURT: Wait a minute. If I hire you to cook french fries and you decide to exercise discretion in other areas, why does exemption apply?

MR. GOLDEN: Well --

THE COURT: The job responsibility doesn't require you to do that. You could be in the back coming up with a cure for cancer, but it doesn't matter because that's not your job.

MR. GOLDEN: Your Honor, I didn't mean to suggest people were straying from what the employer expected of them. My --

THE COURT: But what they expect of them is what the job, what the employer says the job that they're hired for requires. That's the analysis. It's not whether or not I think one guy is smarter than the other, so I gave him some extra responsibilities. The question is whether the job that I'm hired in is such that I am entitled to overtime or the employer is entitled to withhold that overtime from me. It doesn't depend on whether or not I exercised discretion last week so I get paid extra, and I didn't exercise discretion next week so I have to get paid overtime. It has nothing to do with that. It has to do with the job itself, what the job duties are that I am doing. You don't agree with that?

MR. GOLDEN: I agree with that. But my point, your Honor, is if you look at all these 125 G-tech reps over the past six years.

THE COURT: Right.

MR. GOLDEN: If you were to look at what they actually do on a day-to-day basis, how they go about their job --

THE COURT: Right.

MR. GOLDEN: -- the things that they do that are indicia of exercising discretion and judgment, there would be a continuum. It's not everyone is clustered right here. Some people are here, here, here, here. My point is they're all exempt.

THE COURT: Right. In the same way.

MR. GOLDEN: In the same way. But my factual arguments and legal arguments would vary from person to person. My point is, your Honor could say, Mr. Golden, I actually disagree with you with this group. This group of people I actually think are nonexempt for the following reasons. But that --

THE COURT: Who is that going to be? Give me a category that's even possible in your defense.

MR. GOLDEN: In fairness, your Honor, I don't think your Honor will reach that conclusion, but I --

THE COURT: So why should I think that's a persuasive argument.

MR. GOLDEN: Because that's the analysis that the Court will have to undertake.

THE COURT: Yeah, but --

MR. GOLDEN: The Court will have to look at every one on that spectrum.

THE COURT: Give me a scenario where in this -- give me a scenario based on these facts where it would make a difference.

MR. GOLDEN: An individual is hired as a G-tech rep. They never, never actually exercise any discretion or judgment. A call comes in and they say, I can't find a written answer to the particular problem that you're posing and, therefore, I cannot help you.

THE COURT: Okay.

MR. GOLDEN: Good-bye. That person, whom I don't believe exists, but could the plaintiffs find someone among the 125 over the past six years? I don't know. But arguably that person would have a claim that I was misclassified, because in fact --

THE COURT: No, no. Not if the person was hired in the job that you can demonstrate requires that they exercise discretion; right?

MR. GOLDEN: Well, but now, so that's different --

THE COURT: Isn't that true? They couldn't have that argument. They couldn't make an argument, well, I was hired in a job that didn't require that, but I exercised some discretion that the employer didn't require me to exercise.

MR. GOLDEN: Well, if the plaintiffs are willing to litigate this case based on Bloomberg's expectations, we'll have a much simpler case, including a much simpler discovery program. I don't think they're willing to say we're just going to base it on Bloomberg's expectation.

THE COURT: No. They're going to base it on what the nature of the job was, what the job responsibilities are, what people are required to do. And they say that all every single person was required to do the basic computer tech stuff that everybody does. Some people, as they say, my tech guy I tell him my computer doesn't work, he comes in and he says either

I'm going to take it and it's going to take me six days to put it in the freezer and come back and do all this fancy stuff with it or he's going to say reboot. So I could care less what he says, as long as he fixes my problem, right. And sometimes they just say turn it off, turn it back on, that's it. You know, sometimes they'll say, no, this is more complicated, we got to take it downstairs and our experts will take it apart and, you know, we'll fix it. You know, the question is whether -- you know, I mean I'm not even sure I understand totally at this point what kind of discretionary decision making you say goes along with having a major account rep. I mean, I don't understand --

MR. GOLDEN: Well --

THE COURT: -- whether or not if the secretary calls the tech person and says I got a problem, how that's different than if Bill Gates calls the tech people and say I got a problem. They still got the same problem. Bill Gates is a major account, the secretary is not.

MR. GOLDEN: It --

THE COURT: All they got to do is fix the problem.

MR. GOLDEN: It may not change the ultimate conclusion. It will be a factor though in the analysis because --

THE COURT: Why?

MR. GOLDEN: Because --

THE COURT: What difference would it make?

MR. GOLDEN: Because the person who is a major account rep will be proactively communicating with the client to say --

THE COURT: What does that mean in terms of exercising discretion?

MR. GOLDEN: Going to visit them saying, hey, what kind of functions are you using, what are you not?

THE COURT: What is going to visit someone saying what kind of function do you want, have to do with exercising discretion?

MR. GOLDEN: Because that is startly different than the supposed commonality that Mr. Getman claims exists here, which is they're all sitting in a room taking random tickets.

THE COURT: I didn't hear you make that argument. I didn't hear you make the argument that the reason why I should not certify the class is because we have some people who are not working at the call center who are going out and, you know, sitting in the office of Donald Trump trying to negotiate with him how, you know, what kind of technical support he's going to have. I don't understand -- I mean, I'm just ignorant of what you say --

MR. GOLDEN: Your Honor, I apologize if we didn't make that point clear, but we intended that to be the crux of the opposition, which is an FLSA analysis requires an individual-by-individual determination.

THE COURT: Right.

MR. GOLDEN: Each individual G-tech rep, while broadly speaking, they have the same general job, they have very different specific duties.

THE COURT: In what way do you say it's determinative? That's what I'm trying to ask.

MR. GOLDEN: Because I think when the Court ultimately determines whether these individuals exercise discretion and judgment on matters of significance involving the general business operations of the company, among the factors that I think the Court might consider is, are they proactively helping to manage a relationship with a particular customer.

THE COURT: Give me an example of what you anticipate will be the factual issue, give me an example.

MR. GOLDEN: Jen Liguori's declaration.

THE COURT: That he did --

MR. GOLDEN: That she says part of my job was to help manage our relationship with a major account.

THE COURT: What does that mean? I still --

MR. GOLDEN: It means --

THE COURT: Did she send him a Christmas card --

MR. GOLDEN: If I could explain, your Honor.

THE COURT: Right.

MR. GOLDEN: It means getting to know the client, getting to know their particular IT needs, getting to know the

particular uses that they make, getting to understand problems that may arise on a recurring basis.

THE COURT: Right.

MR. GOLDEN: Reaching out to them saying we want to tell you about a new functionality, having a point of contact so that when a call comes in with a problem it's not just going to a random cue, it's going to our --

THE COURT: The only thing that arguably what you just said is -- arguably has to do with exercising discretion saying that I have a new functionality, none of that other stuff has anything to do with exercising discretion inherently, does it?

MR. GOLDEN: Yeah, I think it does, your Honor.

THE COURT: Which part of it? Which part of what you just said is inherently -- means you're exercising discretion?

MR. GOLDEN: Because if you're --

THE COURT: Because I have a personal relationship with you?

MR. GOLDEN: If you're discussing their needs, how their needs could be met, you're necessarily making judgments on the fly. You're not --

THE COURT: No, you didn't say I made a judgment. You say I discussed it.

MR. GOLDEN: Well, but, your Honor --

THE COURT: If I discuss it on the phone what your problem is and you call me at the call center, that doesn't

necessarily mean you're exercising discretion. Because I discussed your problems with you. That's --

MR. GOLDEN: You're offering solutions. You're saying here's how I think you can fix that problem.

THE COURT: That's why they're there.

MR. GOLDEN: That's not what plaintiffs are saying. The plaintiffs are saying, I didn't have any discretion or judgment, I just had to follow procedures.

THE COURT: Right, a procedure to fix the problem.

MR. GOLDEN: And that's not true, that's inaccurate. But when we get to the merit stage, we're going to show that's inaccurate. It's inaccurate for person A for reasons that may be different than --

THE COURT: That's the part that you have not been able to effectively articulate to me, why it's different for one employee than the other when you say that I don't care what you do, you will never get overtime because this job is such that it will never give you overtime regardless of what you do.

MR. GOLDEN: I think, your Honor, if someone is providing responses over the phone to a random caller, I believe that that person is exercising independent discretion and judgment.

THE COURT: That's true of everybody.

MR. GOLDEN: Correct.

THE COURT: All right, so then that's the commonality.

MR. GOLDEN: But your Honor is presupposing that -- your Honor's analysis, respectfully, makes sense if ultimately the Court were to say, I agree that for the reasons that Bloomberg articulates with respect to this cluster of reps, what they all have in common is sufficient to render them exempt, then I would agree with your Honor's assessment. Because you can say we don't need to worry about anything else, we have the commonality that answers the question.

But what if your Honor says, with respect to those what I'll call base line employees, I don't think they're exempt. Okay, but that still doesn't answer the exempt versus nonexempt question for individuals who are not fairly characterized as part of that cluster of base line employees. What about the people who are way over here who are helping to develop new functionalities, who are proactively managing the relationship with a customer, visiting the customer -- not everyone does that. My point is, sure, if what I'll call the base line employees are all -- if the Court concludes that base line employees are all properly classified as exempt, okay, we don't need to worry about the variations. But I recognize that the Court might disagree with that with respect to what I'll call the base line employees. But that --

THE COURT: I could decertify the class if that turns out to be the case.

MR. GOLDEN: I'm sorry?

THE COURT: I could decertify the class if that turns out to be the case.

But what you're arguing is driven by what your possible defenses, alternative defenses might be, not by what the claims are that the plaintiffs have. The plaintiffs have a common claim. Their common claim is very similar; you hired me into a job category that you refused to pay me overtime, even though I am legally entitled to overtime, and you do that with every single person, regardless of what they do or how they do it and we think that we are aggrieved in that respect. They're not here arguing that, well, I'm the only person that has the this kind of job, and you told me that because what I do is different than what the guy sitting next to me does, you're not going to give me overtime. That's not the nature of the issue. Now, if that turns out to be the nature of the issue, then the whole class will scatter. They will have their own claim. But that's not the claim that they brought and that's not the defense that you articulated, you have articulated the individual defense as to any individual plaintiff that should predominate over everybody. If I decide that they -- if it is decided that they don't -- that they're not entitled to overtime because they are in a job which is an exempt job, then that's it. They go home. They all go home, they all go home together. If I decide that they're not in that job category, and they're denied -- they're denied the overtime even though

they're not in an exempt category, then you're right. Unless you come up with a different reason to deny an individual plaintiff their overtime, they all win.

Now, you're saying I should assume that there's going to be enough individual cases that we can look at that's going to indicate that that particular person has a job position and responsibilities that even if you were wrong in denying everybody overtime because you categorically said they were all exempt, that you have a secondary argument that you can show this particular person is exempt and shouldn't recover, shouldn't get overtime. Well, you know, that could end up being ultimately the dispute, and that could destroy their clients. But that's not the nature of the claim that they're making, and that's not the nature of your primary defense. Your primary defense is that, look, we didn't even bother to look at any individual -- make distinctions between individual employees. We hired them and we knew that regardless of what the actual work is that they're doing, that the nature of what we hired them, the position in which we hired them, exempts them from overtime. That's our position, that's still our position, and that continues to be our position unless you, Judge, are going to tell us something different. And even if you tell us something different, we still may take that position and decide we're going to the circuit and have them tell you something different.

But your argument here is not -- well, your defense is that you've lined up every one of these 125 individual plaintiffs, and you have an individual argument to make -- that you intend to make as to each individual plaintiff to demonstrate how they're different than some other plaintiff in terms of why they are exempt. You don't say they're exempt in different ways. You say they're exempt in the same way, you know. And you say different degrees, I guess. But you say they're exempt all in the same way, because they all have the same job expectation and category.

Now my last question really is that -- I mean this is helping to discuss it this way. My last question is, what's the prejudice to you at this point? You know, I understand you want to resist it and you like to keep them down and you know and it's easy for you to defend, but if you can keep it out of the class. But what's the prejudice to you in -- why are we better over my not certifying this class and proceeding efficiently as if the main issue is a class wide issue? Why is it more efficient for me to simply say, no, I'm not going to do that; what is the prejudice that you suffer?

MR. GOLDEN: Well, your Honor, with respect to Rule 23, a few things. Plaintiffs will say we now want to take discovery, presumably not with respect to our own situations, although they know what they did, we want to take discovery into 125 employees over the past six years. Now I --

THE COURT: That's going to happen no matter what.

MR. GOLDEN: But why, your Honor? If there is no class certified, I'm not sure --

THE COURT: Because they still -- why would I deny them that discovery? You want me to -- you don't want me to put off class certification, you want me to deny class certification. Do you really think I'm in the position right now to categorically say that there is no way that they can demonstrate --

MR. GOLDEN: No, fair enough.

THE COURT: -- a class at the end of discovery? Because your argument is that you wanted discovery. You know better than them what --

MR. GOLDEN: Fair enough. If they want to re-move again on a more complete --

THE COURT: Then what's the prejudice to you?

MR. GOLDEN: It's still going to be a different looking discovery.

THE COURT: Why?

MR. GOLDEN: And separately it gets to the ultimate issue --

THE COURT: How is it a different looking discovery? If anything, if I certify the class, it probably would be less complicated discovery than if I don't certify the class because then you want to start digging around trying to figure out you

can find discovery to deny certification of the class, right, rather than dealing with what is clearly the substantive issue.

MR. GOLDEN: Well, let me get to the ultimate issue, then, your Honor, which is I think it still has the burden backwards, in that I don't think the plaintiffs have satisfied their burden under Rule 23, and so the Court is really saying, look, I think ultimately they might get there.

THE COURT: No, I'm just -- no, I'm not saying that. I'm not saying that. I'm saying that it is their burden, and it's their burden here. But I want to make sure that I am very cautious to not -- to think that -- to make sure that I don't make a decision that has some great prejudice to you that I should consider in terms of whether or not, you know, it's appropriate to make this decision now. You know, now you say this -- I think this may be different six months from now that will give you a better opportunity to decide this, then you can articulate it. And then if you do it now, then you're going to irreversibly preclude us from, you know, making some progress in our favor if the merits are on our side, then, you know, I will be much more cautious about it. But, you know, I don't -- I'm not quite sure -- I mean, I want to make sure that I'm not missing something. If you're strenuously objecting to this, I want to make sure that, you know, it's not just your lawyer tactic. I want to make sure that there's not something that's terrible that's going to happen to you that I'm unaware of if I

certify this class.

MR. GOLDEN: Well, your Honor, again I think that it is -- certification would be inconsistent with Dukes. I think it would flip the burden, because in a sense, you know, the burden would, essentially, be flipped on us in some way, shape or form to move down the road to decertify. Now, I understand under the FLSA it's a different analysis, but for Rule 23 purposes I really think it relieves the plaintiffs of their burden -- it's not ours, it's their burden -- and the Court has to conduct a rigorous analysis.

THE COURT: But if you say, if you're not strenuously objecting to the FSLA certification as you are to Rule 23 certification, I mean then what's your argument that I shouldn't do the FSLA certification?

MR. GOLDEN: They're different standards, they're --

THE COURT: No, I understand the different standards. But I'm saying that the standard is not as difficult on the FSLA as it is Rule 23.

MR. GOLDEN: Correct.

THE COURT: So I'm asking you, I'm trying to figure out what your argument is. Are you asking me not to certify either or conditionally approve the FSLA and not to certify Rule 23 or are you asking me to do both?

MR. GOLDEN: Your Honor, I'm asking you to deny both aspects of the motion. I recognize that under the FLSA, it's a

much lighter burden and --

THE COURT: Right.

MR. GOLDEN: And obviously I've read the cases and I understand how the courts typically come out. I think that though if your Honor looks at those FLSA cases, they make clear it's an entirely different standard under Rule 23 and I think plaintiffs have, in effect, tried to conflate the two. Let's just go forward and see what happens.

THE COURT: What's the efficiency of doing the FSLA conditional approval and not doing Rule 23?

MR. GOLDEN: FLSA, the notice could go out -- and by the way if I could correct the record -- for the FLSA, I don't that it's 125. The 125 individuals refers to the entire six year period. So if you're -- just earlier your Honor referred to, well, if we have an FLSA opt in, the most is going to be 125. I think it's actually going to be fewer people because we are looking at a shorter time period. However many individuals. So if they want to send out their notice, shake the trees and see how many people raise their hand and say, yeah, I want to be part of this class, my prediction is it's going to be a small number and we will deal with those people, as opposed to having an opt out class of 125 individuals that we're stuck with today on what I think is plaintiff's failure to have met their burden of showing certification is warranted, particularly in light of Dukes where the Court says every class

action counsel can identify some question in common. That's not the issue.

THE COURT: Well, what's the efficiency of sending out the notice now than having to send out another notice later?

MR. GOLDEN: Well, first of all, I don't think the plaintiffs are ever going to get there in terms of Rule 23. But if you have an opt out notice going out -- I'm sorry, an opt in notice going out now, so some number of individuals, let's just say they say I want to be part of this case. If down the road the plaintiffs renew their motion for Rule 23 and they can carry their evidentiary burden and a different notice goes out to a wider group of people, I don't think anyone is prejudiced there, and the case can proceed the way it ought to now, which is individuals who have indicated a desire to be part of this case. And right now, as far as I know, we're talking about four people, and it hasn't been for lack of plaintiff's counsel trying, we'll deal with the facts as opposed to hypotheticals.

THE COURT: Okay, all right. Thanks.

MR. GOLDEN: Thank you, Judge.

THE COURT: Let Mr. Getman respond. Mr. Getman.

MR. GETMAN: Your Honor, under the defendant's argument, because they've asserted a defense, there could never be a class. I've been doing FLSA cases for about I think now 25 years, and I've never seen a FLSA answer that did not have

some kind of defenses. Under their argument, you would never be able to certify a class because the FLSA defenses are purportedly individual.

That totally misunderstands the standard for Rule 23. And I think exactly the difficulty that I was hearing your Honor raise, that the defendant was not getting, is that the question here on Rule 23 is are there common claims and are there common defenses. And clearly, clearly there's a common defense. That defense is the administrative defense that they say applies to everyone in the class. That is now a commonality. They've established the commonality. That's only one of the common elements. As your Honor points out, there are also common claims with respect to the defendant's policies.

This is not Dukes where there were multiple issues that were necessary to show whether discrimination had occurred in thousands of work sites across the country. The plaintiffs in Dukes could point to no common policies that were at issue. Here we have pointed to the common policies. Those are common pay practices across the board, a common defense, a common determination that nobody gets overtime.

Here we're not flipping the burden. The burden is, are there common claims and are there common defenses. Your Honor asked the defendants, is there some harm here if I grant certification. In fact, there's a common benefit here, and

it's the very benefit that Rule 23 is designed to get at. If we do a FLSA case for individuals only, and it comes out against us, new people get to come in and raise FLSA claims and say I'm in a different boat, I get to do different -- I have different claims, I get a different Judge, I get a different jury possibly, I get -- I handle it differently, and maybe they win. And maybe we have 20 such cases, maybe we have five cases, maybe we have 125 cases.

The point here, and I would think that the benefit to the defendant outweighs the harm here. And the benefit is, we all rise together, we all fall together. And if the defendants got the lock step defense it thinks it's got, great. And it benefits by a class ruling, which is then preclusive to all of those individuals.

The practical concerns for litigation about beating the plaintiffs at this stage and maybe picking off the named plaintiffs or something like that, to try to resolve it, the point here is that the common benefit to the court system, to the parties and to the goals of FLSA, which are all that all individuals who are entitled to overtime receive overtime.

THE COURT: Isn't that -- I mean, that's a determination that I can make at any point. As a matter of fact, in most cases it ends up being the -- if there is a settlement in this case or a judgment in this case, it ends up being the defendant who bears the cost of notifying all the

class members and indicating that they have a right to recover. Why is that such a -- there is such an urgency under Rule 23 at this point to make that determination?

MR. GETMAN: It's not an urgency -- I mean, there are lots and lots of cases out there that suggest that the plaintiff's job is to move for class certification as soon as they can do that. And we have complied with that because we have identified common claims and common defenses which they have actually supported here by fully fleshing out the common defense applicable to everyone. And that's what your Honor and Mr. Golden have been discussing for the last hour. There is a common defense to everyone. They talk about variability within that, but there is a common defense, and they've asserted it and they've explained it thoroughly here today.

The Second Circuit says, and the district courts often highlight that language, that in the second circuit class actions are favored devices for resolving efficiently all claims, rather than encouraging sporadic and fragmented litigation that uses up the Court's time, that uses up litigants' time, that runs up attorney bills with respect to each claim.

The class action device exists because there is efficiency. And particularly here the nature of modern business I think really, this underlies the rise of class actions and the rise of corporate America where you have vast

scales of behaviors which are done the same way with respect to large groups of people. It has to be done as a class action, or we're left with piecemeal litigation, we're left with a terrific amount of time. I could handle an individual FSLA case for not a lot less time than it takes to handle the class. That doesn't benefit my clients, it certainty doesn't benefit the group who has the problem here, and it doesn't benefit the Court system and, ultimately, it doesn't benefit the defendants. Thank you.

THE COURT: This is what I'm -- did you want to --

MR. GOLDEN: May I just very briefly, your Honor? Two things.

First, with respect to the Bloomberg employees who are supposedly benefited, who would benefit by Rule 23, I can tell you that there are a number of G-tech reps who would say I do not want to rise and fall based on the named plaintiffs. And I don't mean to disparage them, but they do not want to be --

THE COURT: They always have the opportunity to opt out.

MR. GOLDEN: But they also could have the opportunity under the FLSA and all of the policy considerations to which Mr. Getman points would be fully satisfied by an FSLA opt in class, if people want to be part of this, if they think they've been aggrieved, they know what their job is. If they think in any way, shape or form they've been treated unfairly, they can

raise their hand and say I want to be part of this class.

And the last thing, and I know Mr. Getman is eager to interrupt as he has been at various points, but the last thing I would like to say is if your Honor reads Judge McMahon's decision in Romero, which is at 212 Westlaw 1514810, Judge McMahon says, after Dukes the fact that plaintiffs came up with a list of common questions is no longer sufficient. The issue is whether the common questions predominate other the individual ones. And in Romero Judge, as various other courts in this circuit have held, with respect to the applicability of exemptions, the Court has to do an individualized determination as to what each putative class member does and that defeats Rule 23.

THE COURT: All right.

MR. GETMAN: Judge, lastly, just on Romero, Romero involved nearly a dozen job titles. Let me just read you some of them. Service managers, mechanics, service writers, porters, cashiers, parts counter persons, receptionists, salespersons, general sales managers, assistant sales managers, finance managers, office managers, inventory managers.

THE COURT: Slow down.

MR. GETMAN: They worked in six different locations, and some of them received overtime, I believe.

THE COURT: This is what I'm going to do, I think that -- I think the plaintiff, you know, has demonstrated that

there is -- that the conditional certification as to if there is a collective action for the class, is appropriate. I think that the plaintiff has demonstrated that those, the claims under FLSA are, on this record, the kind of questions for all of those plaintiffs. So I think that that demonstration has been made under the FLSA claim of action standard.

With regard to the Rule 23 class certification, I'm going to deny that without prejudice. I think that there is still some question -- although, quite frankly, I don't think significant question -- but there's still some question as to whether the common questions predominate over the individual questions. I've heard the nature of the defendant's arguments with regard to that. I don't have a great deal of confidence that the nature of the issue, as it quickly starts to focus as the discovery proceeds, that the -- it really is going to appear that the nature of the individual, questions with regard to individual plaintiffs will predominate over the common questions. I think the common questions are demonstrated with regard to the FLSA claim. I think the appropriate thing clearly is to notify all the potential FLSA, preserve their rights and notify all of the potential plaintiffs that they have an opportunity to opt in. I don't think that that is going to -- I think it's appropriate. I think it's appropriate under -- I don't think reserving the -- putting off the decision or making a decision later as to whether or not Rule

23 class certification is appropriate prejudices either party. I think this case will proceed as a collective action. If it turns out that at an appropriate time that the Rule 23 certification is renewed, and if it's appropriate in light of the facts that are being developed in discovery, go ahead and prove that. Then I think that the appropriate time to do that, in any event, I think the critical thing is particularly since it's going to proceed as a collective action, is to at least notify people of the nature of this lawsuit, indicate that they have rights, if they want to participate -- FLSA rights. I think that it's appropriate if the plaintiff wants to renew the application under Rule 23, once some discovery has been done and the issues have become clear as to the clear commonality or in actual distinctions that the defendant can really draw with regard to its defense, I think it's appropriate to renew it at that time, and to certify that class, if appropriate, on that appropriate record.

Furthermore, I think that the Rule 23 class certification may not end up being of great significance, unless and until this case is either settled or resolved in plaintiff's favor by summary judgment or trial, if that is what occurred at that time.

If the defendant is determined to be liable under FLSA to the opt in plaintiffs, it's very likely that a determination will also be made that they're liable to a class. Otherwise,

they have rights as class members rather than opt in members that could preserve and can be at the appropriate time, those individuals can be notified not only of a potential claim, but of a successful claim.

I think the FLSA notification is sufficient to notify most of the class, the opt in class, whoever that appropriately is, that they have a claim. I think that at a later proceeding, point in this proceeding, we can determine whether or not others who are not opt in plaintiffs, who may or may not have been -- received original notice, whether they want to participate to the extent that they want to make a claim if there is a judgment obtained or settlement obtained by the plaintiff against the defendant. So I think that that issue on this record is a closer question. And I find that given the arguments that are made by the defense -- although I don't have a great deal of confidence that discovery is going to ultimately allow them to somehow have an individual defense against 125 individuals who have all different circumstances, I think that, you know, it is likely that the nature of the progress of discovery will quickly indicate that the sole, the primary, if not the sole issue, will be whether or not all of these individuals who are similarly situated are either exempt or not exempt as a class of individuals. But not having any more specific indication that there is a set of individual plaintiffs whose individual questions would predominate over

the common questions under Rule 23, I think it's appropriate to defer the determination of certification of Rule 23 class until later in the litigation and, at the latest, to do so and send out notice upon either a settlement or a judgment obtained in plaintiff's favor, and make that judgment applicable to the entire class.

So I think that you should refashion the notice, send out the rule -- FLSA opt in notice to the potential class of opt in plaintiffs, and then start moving forward with discovery. And if at an appropriate time we can discuss further the Rule 23 class certification based on some sampling of what could possibly be individual claims and whether or not there is a realistic argument not in the abstract to be made that somehow there are individual claims that predominate, then if it becomes clear that that will not be the case, I would consider certifying the class at that point and we can send out the appropriate additional notices. But as I say it could turn out that the case by settlement or by judgment is the appropriate time to send out the notice, not just of a potential claim, but of an actual claim, that those who wish to take advantage of, can take advantage of in terms of participating in a settlement or a judgment, or deciding to opt out and pursue their own potential claims if they wish to do so.

So the defendant should do what's necessary to either

help the plaintiff to send out the notifications or give them the specific independent information so they can independently reach out to the FLSA opt in plaintiffs, potential plaintiffs, and notify the group of the potential claims.

MR. GETMAN: Your Honor, if I may, a couple of somewhat thorny issues result from this splitting. One is the notice form. We submitted a proposed notice form. Defendants did not object to that form. However, they never agreed to tolling of the Statute of Limitations with respect to the FLSA class. So every bit of delay benefits the defendants because they don't have to pay, because claims expire until an individual files a consent to sue in a FLSA.

THE COURT: But that doesn't change -- I didn't see how what I just said changed --

MR. GETMAN: The change is this. If we can strip out the Rule 23 aspects of the notice and if we can get this out promptly --

THE COURT: Right.

MR. GETMAN: -- then there is a minimal amount of prejudice to the individuals in getting out the notice.

THE COURT: I --

MR. GETMAN: If I have to submit that form to the defendants, they want two weeks to review it, but they never will agree -- I've had it happen over and over, we have to come back to the Court, we have to do motion practice, we have to

get the notice out two months from now. Now two months' worth of claims have expired.

THE COURT: How quickly will you be prepared to send out notice?

MR. GETMAN: I will get the notice out to the defendants by -- tomorrow's Wednesday -- we'll have that notice to the defendants by Wednesday. If they can have a response by Monday and we can get it to the Court, if there is any dispute with our respective versions on Monday and the Court's willing to look at it quickly. My concern is only that people are losing their claims.

MR. GOLDEN: That's --

MR. GETMAN: Unless they're willing to toll the limitations here.

THE COURT: Well, look, my attitude at this point is as long as you take out the Rule 23 notice part, then -- I looked at your notice, I don't see any problems with your notice. If they have some problem, they know what the notice is, unless you're going to change it significantly.

MR. GETMAN: No change.

MR. GOLDEN: Your Honor, I think we would --

THE COURT: They should let you know -- if there is a dispute about it, then let me know on Monday, I'll be here all next week. I'll act on it as quickly as possible.

MR. GOLDEN: I don't expect to --

THE COURT: Right away, the day I get it.

MR. GOLDEN: I don't expect there will be, your Honor. If they strip out everything on the state law side, based on what we've seen already, I think will be fine and we will respond promptly.

MR. GETMAN: The only one aspect that I would propose to change, and I raise it because I realize in looking at it that through some computer error there is a -- in every standard notice form, there is a statement that says retaliation for participation in the case is forbidden. And somehow we ommitted that in our proposal, and I assume there is no --

MR. GOLDEN: Again, I would want to see the language, but in concept --

MR. GETMAN: We'll have that to you by tomorrow.

THE COURT: Unless you have something out of the ordinary.

MR. GETMAN: No.

THE COURT: The common language that in how you want to display, just make sure you have an understanding then. And there is no reason why there should be any delay at all in terms of your moving forward as you had originally planned.

MR. GETMAN: Very good.

The second issue has to do with discovery. And we served discovery immediately in this case. We have gotten

sequential objections, negotiation that don't get raised. We just got, I believe two days ago, a proposed confidentiality order. Now suddenly -- now suddenly that's got to be negotiated. I have seen over and over in my litigation practice that the defendant's strategy is to provide the critical documents just before trial. In this instance I have a real need, based on your Honor's ruling, to obtain the basic discovery that will go to the class, and that is going to be all the job descriptions, any internal audits with respect to whether this is or isn't exempt, any individual complaints and responses.

THE COURT: Have you already generated those requests?

MR. GETMAN: We have already requested that information, and the defendants now have an incentive to delay provision of that information until just before trial.

THE COURT: They may have an incentive, but they don't have an opportunity. So I suggest that you look at the confidentiality order.

MR. GETMAN: I will do that.

THE COURT: And if you agree with it, you get right back to them immediately. I expect both sides to respond to any outstanding document request within 30 days, all right. I expect it to be done immediately with no -- clearly within 30 days, whatever is already outstanding. And I expect you to go ahead and start scheduling depositions for as early as 30 to 60

days out, after that first 30 days exchange of documents, then another 30 to 45 days I expect you to be scheduling depositions. Unless two of you could come up with a different schedule that you can both agree to, I expect that's the way it should efficiently proceed. So even if there's disputes about the confidentiality order, I expect both sides to go ahead and start preparing the production they know is appropriate within that 30 day period. If it takes, you know, some time, days or weeks, so agree upon the confidentiality order, that's not going to put it back the obligation to respond immediately within 30 days, even if the confidentiality order is not signed till the 29th day. You should get those documents together, be ready to produce. If there is a genuine dispute about what's being asked for and what's being refused, then give me a letter right away. I expect if you're going to refuse to produce documents, I expect you to give that refusal in 20 days, all right. I want the actual documents in the hands of the other side 30 days. But if you have some objection to producing some documents and you refuse, you should notify them within 20 days, and then the other side can make whatever argument they want to make to me by letter application why you should be compelled to turn it over, and you could make a response by letter why you should be entitled to withhold. So you can move to do --

MR. GETMAN: Your Honor, if we could have the

discovery exchanged subject to the confidentiality order however -- whatever form it ultimately takes, then the documents can actually be provided.

THE COURT: Well, it seems to me that there is no reason why you can't look at their proposed confidentiality order, figure out whether or not that's -- immediately whether that's something you want to sign in that form or propose something different. I think it is appropriate. I've already indicated that you have -- you're going to have 29 days to agree upon that. If you can't agree upon the confidentiality order within the next 20 days, then you should propose your -- each one of you should propose the language that you say is in dispute and how you say it should be resolved to me and I'll immediately resolve that, so that 30 day delay you can get your documents, all right. So there is nothing that I anticipate that should -- I would hope production would be done even sooner, but there's nothing I anticipate that can't be done to ensure that document production is done within 30 days of today.

I will also schedule a conference after document production next month and depositions in January or February. Why don't I schedule a conference for say February 27th at 10:00 o'clock, and we'll see if we need that conference and see where we are at that point in time. If we need to meet before then, let me know. But otherwise if you have a genuine

dispute, giver it to me by letter so I can resolve that and we can keep moving forward efficiently. And then at the appropriate time renew your Rule 23 application. Obviously if it appears you might be able to settle this case, and you can wrap that up into a settlement, then do it that way. But otherwise make your own judgment about when you think it is appropriate to renew it. But I want it renewed at the appropriate time when we can talk specifically about the facts as they've been uncovered or beginning to be uncovered in discovery that would either support or detract from the defendant's argument that somehow there are individual issues that are really going to predominate in this case.

MR. GETMAN: And I take it when your Honor says without prejudice to the plaintiffs, that means that there is no prejudice with respect to the Statute of Limitations with respect to the class claims, because those would be --

THE COURT: I'm not sure why there would be any --

MR. GETMAN: Well --

THE COURT: -- statute of Limitations issue if I specified --

MR. GETMAN: If it's certified, that would relate back to the filing of the complaint.

THE COURT: Right. So I don't think that's an issue with regard to Rule 23.

All right, so that's the way we'll proceed, okay. So

I'll seen you February. See if you can efficiently move along, all right.

MR. GETMAN: Thank you, your Honor.

MR. GOLDEN: Thank you, Judge.

THE COURT: You're welcome.

(Adjourned to February 27, 2013 at 10:00 a.m.)